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4 MICHELLE YVETTE BROWN,
5 Plaintiff,
6 v.
7 NANCY A. BERRYHILL,
8 Defendant.

9 Case No.18-cv-03703-JSC
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13 **ORDER RE: CROSS-MOTIONS FOR
14 SUMMARY JUDGMENT**
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17 Re: Dkt. Nos. 18, 21
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20 Plaintiff Michelle Yvette Brown seeks social security benefits for a combination of mental
21 and physical impairments, including: posttraumatic stress disorder, depression, anger problems,
22 psychotic disorder not otherwise specified, knee problems, anxiety disorder, bipolar disorder,
23 insomnia, dyslexia, and hypoglycemia (Administrative Record (“AR”) 268, 315, 949.) Pursuant
24 to 42 U.S.C. § 405(g), Plaintiff filed this lawsuit for judicial review of the final decision by the
25 Commissioner of Social Security (“Commissioner”) denying her benefits claim. Now before the
26 Court are Plaintiff’s and Defendant’s Motions for Summary Judgment.¹ (Dkt. Nos. 18, 21.)
27 Because the Administrative Law Judge’s (“ALJ”) weighing of the medical evidence and adverse
28 credibility finding are not supported by substantial evidence, the Court GRANTS Plaintiff’s motion,
DENIES Defendant’s cross-motion, and REMANDS for an award of benefits.

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30 **LEGAL STANDARD**
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32 A claimant is considered “disabled” under the Social Security Act if she meets two
33 requirements. *See* 42 U.S.C. § 423(d); *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999).
34 First, the claimant must demonstrate “an inability to engage in any substantial gainful activity by

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38 ¹ Both parties have consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. §
39 636(c). (Dkt. Nos. 9 & 11.)

1 reason of any medically determinable physical or mental impairment which can be expected to
2 result in death or which has lasted or can be expected to last for a continuous period of not less
3 than 12 months.” 42 U.S.C. § 423(d)(1)(A). Second, the impairment or impairments must be
4 severe enough that she is unable to do her previous work and cannot, based on her age, education,
5 and work experience “engage in any other kind of substantial gainful work which exists in the
6 national economy.” 42 U.S.C. § 423(d)(2)(A).

7 To determine whether a claimant is disabled, an ALJ is required to employ a five-step
8 sequential analysis, examining: “(1) whether the claimant is ‘doing substantial gainful activity’;
9 (2) whether the claimant has a ‘severe medically determinable physical or mental impairment’ or
10 combination of impairments that has lasted for more than 12 months; (3) whether the impairment
11 ‘meets or equals’ one of the listings in the regulations; (4) whether, given the claimant’s ‘residual
12 functional capacity,’ the claimant can still do his or her ‘past relevant work’; and (5) whether the
13 claimant ‘can make an adjustment to other work.’” *Molina v. Astrue*, 674 F.3d 1104, 1110 (9th
14 Cir. 2012) (quoting 20 C.F.R. §§ 404.1520(a), 416.920(a)).

15 An ALJ’s “decision to deny benefits will only be disturbed if it is not supported by
16 substantial evidence or it is based on legal error.” *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir.
17 2005) (internal quotation marks and citation omitted). As explained by the Ninth Circuit,
18 “[s]ubstantial evidence means such relevant evidence as a reasonable mind might accept as
19 adequate to support a conclusion.” *Id.* (internal quotation marks and citation omitted). “Where
20 evidence is susceptible to more than one rational interpretation, it is the ALJ’s conclusion that
21 must be upheld.” *Id.* In other words, if the record “can reasonably support either affirming or
22 reversing, the reviewing court may not substitute its judgment for that of the Commissioner.”
23 *Gutierrez v. Comm’r of Soc. Sec.*, 740 F.3d 519, 523 (9th Cir. 2014) (internal quotation marks and
24 citation omitted). However, “a decision supported by substantial evidence will still be set aside if
25 the ALJ did not apply proper legal standards.” *Id.*

26 PROCEDURAL HISTORY

27 Plaintiff filed an application for supplemental security income under Title XVI of the
28 Social Security Act (the “Act”) on September 22, 2014 alleging a disability onset date of April 1,

1 2013. (AR 15, 180.) Her application was denied both initially and upon reconsideration. (AR 15.)
2 Plaintiff then submitted a written request for a hearing before an ALJ and the hearing was held on
3 August 7, 2017. (*Id.*) On November 28, 2017, the ALJ issued a decision finding Plaintiff not
4 disabled. (AR 15-26.) Plaintiff filed a request for review of the ALJ’s decision which was denied
5 on March 21, 2017 making the ALJ’s decision the Commissioner’s final decision. (AR 7-9.)
6 Plaintiff commenced this action for judicial review of the Commissioner’s decision on June 21,
7 2018, pursuant to 42 U.S.C. § 405(g).

8 ADMINISTRATIVE RECORD

9 The ALJ found Plaintiff not disabled under section 1614(a)(3)(A) of the Act taking into
10 consideration the testimony and other evidence, and using the SSA’s five-step sequential
11 evaluation process for determining disability. (AR 15-26.)

12 At Step One, the ALJ found that Plaintiff engaged in substantial gainful activity from April
13 2015 through June 2015, but that since that period there has not been a continuous 12-month
14 period during which she engaged in substantial gainful activity. (AR 17-18.)

15 At Step Two, the ALJ found that Plaintiff has the following severe impairments: major
16 depressive disorder, posttraumatic stress disorder, bipolar disorder, anxiety disorder not otherwise
17 specified, dissociative identity disorder, borderline personality disorder, cannabis abuse in
18 reported remission, psychotic disorder not otherwise specified, and hypoglycemia described as
19 causing fainting spells versus a seizure-like disorder. (AR 18.)

20 At Step Three, the ALJ found that Plaintiff did not have an impairment or combination of
21 impairments that meets or medically equals the severity of one of the listed impairments in 20
22 CFR Part 404, Subpart P, Appendix 1 (20 CFR 416.920(d), 416.925, 416.926). (*Id.*) For
23 Plaintiff’s mental impairments, the ALJ considered listings 12.03, 12.04, 12.06, 12.08, and 12.15.
24 (AR 19.) The ALJ found that Plaintiff’s mental impairments do not cause at least two “marked”
25 limitations or one “extreme” limitation such that the Paragraph B criteria were not satisfied. (*Id.*)

26 The ALJ next considered Plaintiff’s residual functional capacity (“RFC”) and concluded
27 that Plaintiff retained the RFC to perform medium work with the following limitations: cannot
28 climb ladders, ropes, or scaffolds due to seizures like symptoms, avoid concentrated use of

1 hazardous machinery and exposure to unprotected heights, work must be limited to simple as
2 defined in the DOT as SVP levels 1 and 2, routine and repetitive tasks, she needs to work in a low
3 stress job defined as having only occasional decision making and only occasional changes in the
4 work setting, no interaction with the general public and only occasional interaction with
5 coworkers. (AR 20.)

6 The ALJ found that Plaintiff's "medically determinable impairment could reasonably be
7 expected to cause the alleged symptoms; however, [Plaintiff's] statements and those of her
8 mother, Kimberly Duncan, concerning the intensity, persistence and limiting effects of these
9 symptoms are assigned little weight because they are not entirely consistent with the medical
10 evidence outline above and other evidence in the record." (AR 22.) The ALJ gave significant
11 weight to the physical and mental assessments of the State Agency consultants as well as to an
12 intake evaluation performed by Alameda County Behavioral Health Care Services finding these
13 assessments and the evaluation "consistent with the evidence as a whole." (AR 23.) The ALJ
14 assigned little weight to a temporary disability form completed by Joseph Marquis, the opinion of
15 Rick Ramirez a licensed clinical social worker, the medical statement completed by Mr. Ramirez
16 and Plaintiff's treating physician Dr. Trotta, and a letter written by Plaintiff's treating psychiatrist
17 Dr. Liles. (AR 23-24.)

18 At Step Four, the ALJ found that Plaintiff was unable to perform any past relevant work as
19 a home attendant based on the vocational expert's testimony. (AR 24.)

20 At Step Five, the ALJ concluded that Plaintiff was not disabled because she could perform
21 other work in significant numbers in the national economy, citing packer, box assembler, and
22 machine feeder as representative occupations that Plaintiff could perform. (AR 25.) The ALJ
23 based this determination on the testimony of the vocational expert and Plaintiff's residual
24 functional capacity, age, education, and work experience in conjunction with the Medical-
25 Vocational Guidelines. (*Id.*)

26 DISCUSSION

27 Plaintiff raises three primary issues with the ALJ's decision. First, Plaintiff insists that the
28 ALJ erred in weighing the medical evidence, and in particular, failed to provide specific and

1 legitimate reasons for assigning little weight to the opinions of Plaintiff’s treating physicians.
2 Second, Plaintiff contends that the ALJ’s adverse credibility finding is not supported by
3 substantial evidence. Third, Plaintiff maintains that the ALJ erred in finding that Plaintiff did not
4 meet or equal listings 12.04, 12.06, and 12.15.

5 **A. The ALJ’s Weighing of the Medical Evidence**

6 In the Ninth Circuit, courts must “distinguish among the opinions of three types of
7 physicians: (1) those who treat the claimant (treating physicians); (2) those who examine but do
8 not treat the claimant (examining physicians); and (3) those who neither examine nor treat the
9 claimant (nonexamining physicians).” *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995) (as
10 amended (Apr. 9, 1996)). A treating physician’s opinion is entitled to more weight than that of an
11 examining physician, and an examining physician’s opinion is entitled to more weight than that of a
12 nonexamining physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). “The opinion of an
13 examining doctor, even if contradicted by another doctor, can only be rejected for specific and
14 legitimate reasons that are supported by substantial evidence in the record,” and the ALJ “must
15 provide “clear and convincing” reasons for rejecting an uncontradicted opinion of an examining
16 physician. *Lester*, 81 F.3d at 830-31.

17 “When an ALJ does not explicitly reject a medical opinion or set forth specific, legitimate
18 reasons for crediting one medical opinion over another, he errs. In other words, an ALJ errs when
19 he rejects a medical opinion or assigns it little weight while doing nothing more than ignoring it,
20 asserting without explanation that another medical opinion is more persuasive, or criticizing it
21 with boilerplate language that fails to offer a substantive basis for his conclusion.” *Garrison v.*
22 *Colvin*, 759 F.3d 995, 1012-13 (9th Cir. 2014) (internal citation omitted). In weighing medical
23 opinions, the ALJ may consider (1) the examining relationship, (2) the treatment relationship, (3)
24 the supportability, (4) the consistency, (5) the specialization, and (6) other factors brought to the
25 ALJ’s attention. 20 C.F.R. § 416.927(c)(5). In conducting this review the court “must consider the
26 entire record as a whole, weighing both the evidence that supports and the evidence that detracts
27 from the Commissioner’s conclusion, and may not affirm simply by isolating a specific quantum
28 of supporting evidence.” *Trevizo v. Berryhill*, 871 F.3d 664, 675 (9th Cir. 2017).

1 Plaintiff contends that the ALJ committed multiple errors with respect to her weighing of
2 the medical evidence. In particular, Plaintiff contends that the ALJ erred in giving little weight to
3 the medical source statement from her treating therapist Rick Ramirez and physician Dr. Trotta,
4 and the letter written by her treating psychiatrist, Dr. Liles. Plaintiff also insists that the ALJ erred
5 in giving the most weight to the opinions of non-examining medical consultants Drs. Moura and
6 Ferrell.

7 **1. Treating Physician Dr. Trotta and Therapist Ramirez**

8 The ALJ gave little weight to a medical source statement completed by Dr. Trotta and
9 Therapist Ramirez of the Native American Health Center (hereafter referred to as “Dr. Trotta’s
10 statement) finding that Plaintiff had mild restriction in the activities of daily living, marked
11 difficulties in maintaining social functioning, extreme difficulties in maintaining concentration,
12 persistence or pace, and four or more episodes of decomposition within 12-month period, each of
13 at least 2 weeks duration.” (AR 590.) The ALJ discounted this opinion “because the opinion is
14 overly restrictive in light of the claimant’s minimal ongoing mental health treatment, activities of
15 daily living, and these medical care providers made no mention of the claimant’s substance use.”
16 (AR 24, 590.) The ALJ’s decision is not supported by substantial evidence.

17 First, the ALJ’s statement that Plaintiff has “minimal ongoing mental health treatment” is
18 not supported by the record. In his medical source opinion, Dr. Trotta stated that he had been
19 providing Plaintiff treatment 1-2 times per month for two years. (AR 590.) The medical record
20 reflects numerous treatment notes from the Native American Health Center over this two-year
21 period. (AR 659-839.) Within these records there are repeated references to Plaintiff’s mental
22 health issues: “member says she has been feeling depressed every day...was cutting on her arm a
23 few weeks ago” (AR 155 (9/5/14 treatment note)); “member described panic attacks she
24 experiences on an irregular basis; most recently 2 days ago” (AR 799 (9/22/14 treatment note));
25 “member described ‘breakdowns’ that she continues to have 2-3x/week” (AR 739 (4/28/15
26 treatment note)); “member has been depressed and has stopped eating” (AR 715 (9/4/15 treatment
27 note); “member has been in and out of the hospital ‘six times’ due to suddenly fainting”); “feels
28 depressed and was tearful numerous times during the visit” (AR 709 (9/15/15 treatment note));

1 “indicated suicidal ideation” (AR 706 (10/29/15 treatment note)); “frequent black-outs since June”
2 (AR 702 (11/3/15 treatment note)); “suicidal ideation” (AR 689 (1/25/16 treatment note: “member
3 thought about turning on the heater in her apartment to asphyxiate herself”); “member expressed
4 suicidal ideation to medical staff after being informed she could not be seen for pelvic exam” (AR
5 682 (2/2/16 treatment note)); “[o]ver the last eight to 12 months, member has increasingly been
6 showing traits of Borderline Personality Disorder” (AR 663 (3/10/16 treatment note)).

7 While these records do reflect several no-show appointments, Dr. Trotta specifically stated
8 that Plaintiff has “extreme difficulty remembering her therapy appointments, she cannot seem to
9 organize herself to get to various providers for her scheduled appts. Significant memory lapses on
10 a daily basis, for up to 2-3 hours per incident.” (AR 591 (emphasis in original).) The ALJ failed
11 to consider Dr. Trotta’s explanation for any gaps in Plaintiff’s treatment. Further, notwithstanding
12 Dr. Trotta’s explanation, intermittent mental health treatment is not a legitimate basis for rejecting
13 Dr. Trotta’s statement regarding Plaintiff’s limitations. *See Garrison*, 759 F.3d at 1017 (“[c]ycles
14 of improvement and debilitating symptoms are a common occurrence [with mental health issues],
15 and in such circumstances it is error for an ALJ to pick out a few isolated instances of
16 improvement over a period of months or years and to treat them as a basis for concluding a
17 claimant is capable of working.”); *Ghanim v. Colvin*, 763 F.3d 1154, 1161-62 (9th Cir. 2014)
18 (ALJ erred in rejecting the opinions of treating physicians based on treatment notes showing
19 “some improved mood and energy level;” the treatment notes must read in the ““context of the
20 overall diagnostic picture”” and “consistently reflect[ed] that [the plaintiff] continued to
21 experience severe symptoms, including ongoing depression and auditory hallucinations, difficulty
22 sleeping, nightmares, and memory loss”). Accordingly, the ALJ’s finding that Plaintiff has had
23 “minimal ongoing mental health treatment” is not a specific or legitimate reason for rejecting Dr.
24 Trotta’s opinion.

25 Second, the ALJ’s statement that Plaintiff’s activities of daily living undermine Dr.
26 Trotta’s opinion is likewise not supported by substantial evidence. As an initial matter, the ALJ
27 relies on Plaintiff’s adult function report which was completed a year and a half before Dr.
28 Trotta’s report and predates much of the treatment records that Dr. Trotta relied upon in reaching

1 his opinion. *Compare* AR 319 (Plaintiff's 12/5/14 Adult Function Report) *with* AR 590 (Dr.
2 Trotta's 6/26/16 medical source statement).² Further, Plaintiff's reported activities of daily living
3 are not inconsistent with Dr. Trotta's finding which stated that Plaintiff had only mild restriction
4 in the activities of daily living. (AR 590.) The Ninth Circuit "has repeatedly asserted that the mere
5 fact that a plaintiff has carried on certain daily activities, such as grocery shopping, driving a car,
6 or limited walking for exercise, does not in any way detract from her credibility as to her overall
7 disability. One does not need to be "utterly incapacitated" in order to be disabled." *Vertigan v.*
8 *Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001). That Plaintiff drives her car, uses public
9 transportation, goes shopping in stores, and prepares her own (microwave) meals does not mean
10 she does not suffer from severe mental health issues.³ See *Fair v. Bowen*, 885 F.2d 597, 603 (9th
11 Cir.1989) ("[M]any home activities are not easily transferable to what may be the more grueling
12 environment of the workplace, where it might be impossible to periodically rest or take
13 medication.")

14 Third and finally, the ALJ rejected Dr. Trotta's opinion because it "made no mention of
15 the claimant's substance use." (AR 24.) However, the report actually *does* include a reference to
16 substance abuse as Dr. Trotta concluded that neither "alcohol or substance abuse contribute to any
17 of [Plaintiff's] limitations." (AR 592.) Further, it is unclear why Plaintiff's substance abuse
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19 ² Plaintiff also completed an Adult Function Report on June 15, 2015. (AR 347-355.) The ALJ
20 does not mention this report—which was completed six months after the one on which the ALJ
21 relies heavily—except to reject Plaintiff's self-reported difficulty paying attention over five
22 minutes because "she was able to ask questions during the entirety of her hearing that lasted
23 almost 30 minutes without any noted problem concentrating." (AR 22.) The ALJ notably fails to
24 mention that in the six months between reports, Plaintiff's self-reported activities of daily living
25 declined. For example, in December she reported that she "do[es]n't care how she looks" while in
26 June she stated that she "won't get dressed for days at a time." (*Compare* AR 320 *with* AR 348.)
Likewise, in December for "feeds self" she wrote "microwave," but in June she stated she "go[es]
without eating for days." (*Compare* AR 320 *with* AR 348.) Further, in December she needed
help/reminders to wash her back and body, but six months later she needed help/reminders "to eat,
put clothes on and [unintelligible] clothes." (*Compare* AR 321 *with* AR 349.) For shopping, in
response how often she shops and how long it takes, in December she wrote "not often, it can take
a few minutes," but six months later stated "with my severe anxiety I shop only once or twice a
month." (*Compare* AR 322 *with* AR 350.)

27 ³ The ALJ also listed "live on her own" as an activity of daily living, but the cited pages either
28 state that she lives in an apartment with friends (Exhibit 7E at 1 (AR 310)) or contain no reference
to her living situation (Exhibit 12E (AR 339)). Further, as of June 2015, Plaintiff reported that she
was "homeless" and living with "different people." (AR 347.)

1 would be material to Dr. Trotta’s opinion as the ALJ herself concluded that even though Plaintiff’s
2 “cannabis abuse in reported remission [is] severe, it is not a condition material to the
3 determination of this case because the evidence does not establish that the claimant’s co-occurring
4 disorders would improve to the point of non-disability in the absence of drug and/or alcohol
5 abuse.” (AR 22.) Thus, the ALJ’s statement regarding Dr. Trotta’s failure to note Plaintiff’s
6 substance abuse is neither an accurate (legitimate) or specific reason for rejecting his opinion.

7 Accordingly, the ALJ failed to provide specific and legitimate reasons for rejecting the
8 opinion of Plaintiff’s treating physician Dr. Trotta.

9 **2. Treating Psychiatrist Dr. Liles**

10 The ALJ gave little weight to the letter submitted by Plaintiff’s treating psychiatrist Dr.
11 Liles that she was under his care for a “totally disabling psychiatric condition” (AR 598) because
12 the “statement is conclusory, without any explanation, and not consistent with the evidence as a
13 whole.” (AR 24.) While the Commissioner is correct that the ALJ is the ultimate arbitrator of
14 disability, *see* 20 C.F.R. § 416.927(e)(1), (2), the ALJ erred in rejecting Dr. Liles’ opinion out of
15 hand without providing an explanation (the very critique the ALJ made regarding Dr. Liles) and in
16 ignoring the two years of treatment records from the Schuman-Liles Clinic which predated Dr.
17 Liles’s letter. (AR 595-650.) These records consistently reflect that Plaintiff is depressed, has
18 anxiety, and hears voices (AR 616, 621, 622, 628, 632, 634, 638, 645, 650), has panic attacks
19 (AR 647, 638), and has been diagnosed with: “Bipolar Disorder, Unspecified”; “Severe Major
20 Depression, Recurrent Episode with Psychotic Behavior”; and “Posttraumatic Stress Disorder”
21 (AR 609, 612, 615, 619, 627, 631, 637, 641-42). Given the ALJ’s failure to acknowledge this
22 evidence, the ALJ’s rejection of Dr. Liles’s opinion as inconsistent with the evidence is not
23 supported by substantial evidence.

24 **3. Non-Examining Medical Consultants Drs. Moura and Ferrell**

25 Next, Plaintiff challenges the ALJ’s decision to give significant weight to the opinions of
26 non-examining, non-treating medical consultants Drs. Moura and Ferrell. Drs. Moura and Ferrell
27 opined that Plaintiff had only moderate mental functioning limitations and could understand,
28 remember and carry out simple 1-2 step tasks throughout a regular 40-hour workday and

1 workweek and could interact with supervisors and peers, but would do best in an environment
2 with limited public contact. (AR 36-37, 52-54.) The ALJ accorded significant weight these
3 opinions because they were “consistent with the evidence as a whole and are based on program
4 expertise.” (AR 23.) The ALJ’s finding is not supported by substantial evidence.

5 “The opinion of a nonexamining medical advisor cannot by itself constitute substantial
6 evidence that justifies the rejection of the opinion of an examining or treating physician.” *Morgan*
7 *v. Comm’r of Soc. Sec. Admin.*, 169 F.3d 595, 602 (9th Cir. 1999). Likewise, “the report of [a]
8 nontreating, nonexamining physician, combined with the ALJ’s own observation of [the]
9 claimant’s demeanor at the hearing,” is not substantial evidence sufficient to support the
10 Commissioner’s rejection of an examining physician’s opinion that the claimant was disabled.
11 *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th Cir. 1984). Rather, the ALJ must point to “specific
12 evidence” to support a finding that a nontreating, nonexamining physician’s opinion was entitled
13 to greater weight than that of a treating or examining physician. *Morgan*, 169 F.3d at 602.

14 Here, the ALJ failed to point to any specific evidence and instead just found that Drs.
15 Moura and Ferrell’s opinions were “consistent with the evidence as a whole.” (AR 23.) This
16 conclusory statement is insufficient and it is particularly problematic where—as here—the bulk of
17 the medical evidence postdated their opinions. Dr. Moura’s opinion is dated January 23, 2015
18 (AR 37) and Dr. Ferrell’s opinion is dated August 7, 2015 (AR 54), whereas Dr. Trotta’s opinion
19 is from June 20, 2016 (AR 592) and Dr. Liles’s letter is dated May 17, 2016 (AR 598).
20 Accordingly, the ALJ failed to provide specific and legitimate reasons based on substantial
21 evidence for giving greater weight to non-examining, non-treating medical consultants Drs. Moura
22 and Ferrell than Plaintiff’s treating physicians.⁴

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25 _____
26 ⁴ It is unclear what the ALJ meant when she referred to Drs. Moura and Ferrell’s “program
27 expertise.” The regulation which the Commissioner cites in support of this rationale does not have
28 the cited subsections and does not refer to “program expertise.” (Dkt. No. 21 at 7:13-14 (citing 20
C.F.R. § 416.927(e)(1), (2)). To the extent that the ALJ was referring to their specialization as
psychologists/psychiatrists, their specialization is just one of the many factors which ALJs
consider when weighing the medical evidence and does not trump factors such as the length,
nature and extent of the treating relationship. See 20 C.F.R. § 416.927(c).

1 Based on the foregoing, the ALJ’s weighing of the medical evidence is not supported by
2 substantial evidence. Given this conclusion, the Court need not consider Plaintiff’s additional
3 argument regarding the ALJ’s treatment of the Alameda County Behavioral Health Care Services
4 Intake Form.

5 **B. The ALJ’s Adverse Credibility Finding**

6 To “determine whether a claimant’s testimony regarding subjective pain or symptoms is
7 credible,” an ALJ must use a “two-step analysis.” *Garrison*, 759 F.3d at 1014. “First, the ALJ
8 must determine whether the claimant has presented objective medical evidence of an underlying
9 impairment which could reasonably be expected to produce the pain or other symptoms alleged.”
10 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007) (citations omitted). “Second, if the
11 claimant meets the first test, and there is no evidence of malingering, the ALJ can reject the
12 claimant’s testimony about the severity of [his] symptoms only by offering specific, clear and
13 convincing reasons for doing so.” *Id.* (citations omitted). The clear and convincing standard is “the
14 most demanding required in Social Security cases.” *Moore v. Comm’r of the Soc. Sec. Admin.*, 278
15 F.3d 920, 924 (9th Cir. 2002).

16 Here, the ALJ did not find that Plaintiff was malingering, but did find that while Plaintiff’s
17 “medically determinable impairments could reasonably be expected to cause the type of alleged
18 symptoms,” that Plaintiff’s testimony and that of her mother “concerning the intensity, persistence
19 and limiting effects of these symptoms” was “not entirely consistent with the medical evidence
20 outlined above and other evidence in the record.” (AR 22.) As with the ALJ’s basis for rejecting
21 the opinion of Plaintiff’s treating physicians as inconsistent with the “medical evidence as a
22 whole,” the same conclusory rationale fails to properly support the ALJ’s adverse credibility
23 finding. *See Trevizo v. Berryhill*, 871 F.3d 664, 678 (9th Cir. 2017) (finding that the ALJ erred in
24 using “boilerplate language” for the adverse credibility finding rather than offering “specific,
25 clear, and convincing reasons.”). The Court thus reviews the reasons the ALJ identified elsewhere
26 in her opinion as reasons for rejecting Plaintiff’s allegations.

27 First, the ALJ found that Plaintiff’s failure to seek consistent mental health care
28 “undermines the limiting effects of her mental conditions.” (AR 21.) As discussed *supra*, this is

1 neither accurate nor a proper basis for rejecting Plaintiff's subjective reports of pain. The medical
2 record contains multiple examples of Plaintiff seeking mental health treatment and any gaps in
3 treatment were explained by Dr. Trotta as related to her underlying mental health issues. (AR 591
4 (noting that Plaintiff has "extreme difficult remembering her therapy appointments, she cannot
5 seem to organize herself to get to various providers for her scheduled appts. Significant memory
6 lapses on a daily basis, for up to 2-3 hours per incident.") (emphasis in original).) *See also*
7 *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996) ("[a]ppellant may have failed to seek
8 psychiatric treatment for [her] mental condition, but it is a questionable practice to chastise one
9 with a mental impairment for the exercise of poor judgment in seeking rehabilitation.") (quoting
10 *Blankenship v. Bowen*, 874 F.2d 1116, 1124 (6th Cir. 1989)).

11 Second, the ALJ noted that a mental status examination contradicted Plaintiff's statement
12 and that of her mother that she has difficulty paying attention beyond 5 minutes. (AR 21, 22.) For
13 this, the ALJ cites to an October 14, 2014 treatment note which, under "Mental Status Exam,"
14 states that Plaintiff's attention was "within normal limits—good." (AR 619.) Again, the ALJ
15 erred in cherry-picking one example among the dozens of treatment records to support her
16 conclusion while ignoring the contradictory evidence, and in particular, the statement of her
17 treating physician that she has significant memory lapses on a daily basis. *See Garrison*, 759 F.3d
18 at 1017 ("[c]ycles of improvement and debilitating symptoms are a common occurrence [with
19 mental health issues], and in such circumstances it is error for an ALJ to pick out a few isolated
20 instances of improvement over a period of months or years and to treat them as a basis for
21 concluding a claimant is capable of working.").

22 Third, the ALJ rejected Plaintiff's report that she has hypoglycemia which causes frequent
23 fainting spells and/or seizures as not supported by the record. (AR 22.) It is unclear what sort of
24 record support would satisfy the ALJ. The record contains numerous references to Plaintiff's
25 seizures and blackouts. (AR 603, 680, 695, 702, 707, 712.) In addition, her September 2, 2015
26 treatment note state that "she has been in and out of the hospital 'six times' due to suddenly
27 fainting." (AR 714; *see also* 563 (8/5/15 Paramedics Plus statement which indicates that Plaintiff
28 "was found ambulating unsteadily on the sidewalk after bystanders called 911 for a woman lying

1 on the sidewalk).) Accordingly, the ALJ failed to offer clear and convincing reasons supported by
2 substantial evidence for rejecting Plaintiff's testimony regarding her seizures.

3 Fourth, the ALJ found that Plaintiff's activities of daily living did not support her
4 subjective reports of pain. The ALJ's findings regarding Plaintiff's activities of daily living are
5 not supported by substantial evidence as discussed *supra*. The Court only addresses the ALJ's
6 reliance on the fact that the record reflects that on September 4, 2014, Plaintiff "went to Las Vegas
7 to have some fun." (AR 22 (citing Exhibit 15F/155 (AR 813)).) While the cited record does
8 indicate that Plaintiff went to Las Vegas on this date, the very same page also states that "she has
9 been feeling depressed every day" and that she "was cutting on her arm a few weeks ago, left scars
10 on forearm." (AR 813.) Thus, the ALJ failed to offer clear and convincing reasons for rejecting
11 Plaintiff's subjective reports of pain based on Plaintiff's activities of daily living.⁵

12 Fifth, the ALJ found that there was "evidence in the record that the claimant stopped
13 working for reasons not related to her allegedly disabling impairments." (AR 22.) In support of
14 this finding, the ALJ notes that she stopped providing in-home supportive services because the
15 older adult she was caring for put a stay away order on her because she did not want to marry
16 him." (*Id.* (citing Exhibit 12F/3 (AR 585).) In fact, the full text of the cited page states that
17 Plaintiff reported that when she declined the patient's sexual advances and offer of marriage "she
18 claims he put glass in her food and feigned abuse so she would lose her employment." (AR 585.)
19 The ALJ does not acknowledge this text which if true—given Plaintiff's documented history of
20 PTSD as a result of sexual and physical abuse—could explain her inability to return to that
21 position, or if not true, would be consistent with the treatment notes which reflect Plaintiff's
22 history of hallucinations. Nor does the ALJ acknowledge Plaintiff's testimony that her medical

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24 ⁵ The Commissioner also argues that Plaintiff's past work as a caregiver and housecleaner support
25 the ALJs adverse credibility finding (Dkt. No. 21 at 9); however, the ALJ did not cite past work as
26 an activity of daily living supporting the credibility determination and thus will not be considered.
27 *See Bray v. Commissioner of Social Security Admin.*, 554 F.3d 1219, 1225 (9th Cir. 2009) ("Long-
28 standing principles of administrative law require us to review the ALJ's decision based on the
reasoning and factual findings offered by the ALJ—not post hoc rationalizations that attempt to
intuit what the adjudicator may have been thinking."). "We are constrained to review the reasons
the ALJ asserts." *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003). It is worth noting,
however, that the ALJ's finding cited by the Commissioner was merely that Plaintiff engaged in
substantial gainful activity for a three-month period in 2015.

1 provider told her to stop working. (AR 959-960.) Accordingly, the ALJ’s finding regarding the
2 reasons Plaintiff stopped work is not supported by substantial evidence.

3 Finally, the ALJ discounted Plaintiff’s credibility because she “was able to ask questions
4 during the entirety of her hearing.” (AR 22.) This statement does not make sense as Plaintiff—
5 who was represented by counsel—did not ask any questions during her hearing. (AR 944-693.)
6 The Commissioner suggests that this was an inadvertent oversight on the part of the ALJ who
7 meant answer not ask. (Dkt. No. 21 at 10 n.6.) Even if so, “the ALJ failed to specify how
8 plaintiff’s ability to [answer questions during a 30-minute hearing] would translate into an ability
9 to perform gainful employment.” *See White v. Colvin*, No. 13-1626-PLA, 2014 WL 4187823, at
10 *7 (C.D. Cal. Aug. 21, 2014). Further, Plaintiff appeared at the hearing by telephone, so it is not
11 as though the ALJ personally observed how she answered the questions.

12 In sum, the ALJ’s adverse credibility finding does not satisfy the “demanding” “clear and
13 convincing standard.” *Garrison*, 759 F.3d at 1013.

14 ***

15 Because the ALJ’s consideration of the medical evidence and adverse credibility finding
16 are not supported by substantial evidence, the ALJ’s decision cannot stand. Given this, the Court
17 need not consider Plaintiff’s additional argument that the ALJ erred at Step Three when she failed
18 to find that Plaintiff’s impairments did not meet or equal listings 12.04, 12.06, or 12.15. The
19 ALJ’s errors here go to the heart of the disability determination and are not harmless. *See*
20 *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1099 (9th Cir. 2014) (“An error is
21 harmless if it is inconsequential to the ultimate nondisability determination, or if the agency’s path
22 may reasonably be discerned, even if the agency explains its decision with less than ideal clarity.”)
23 (internal quotation marks and citations omitted); *Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3d
24 1050, 1056 (9th Cir. 2006) (“[A] reviewing court cannot consider the error harmless unless it can
25 confidently conclude that no reasonable ALJ, when fully crediting the testimony, could have
26 reached a different disability determination.”).

27 **C. Remand**

28 Plaintiff asks the Court to remand for immediate benefits under the credit-as-true rule.

1 Generally, when the Court reverses an ALJ’s decision, “the proper course, except in rare
2 circumstances, is to remand to the agency for additional investigation or explanation.” *Benecke v.*
3 *Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004). However, a court may remand for an immediate
4 award of benefits where “(1) the record has been fully developed and further administrative
5 proceedings would serve no useful purpose; (2) the ALJ has failed to provide legally sufficient
6 reasons for rejecting evidence, whether claimant testimony or medical opinion; and (3) if the
7 improperly discredited evidence were credited as true, the ALJ would be required to find the
8 claimant disabled on remand.” *Garrison*, 759 F.3d at 1020. Each part of this three-part standard
9 must be satisfied for the court to remand for an award of benefits, *id.*, and “[i]t is the ‘unusual
10 case’ that meets this standard.” *Williams v. Colvin*, No. 12-cv-6179-YGR, 2014 WL 957025, at
11 *14 (N.D. Cal. Mar. 6, 2014) (quoting *Benecke*, 379 F.3d at 595); *Leon v. Berryhill*, 880 F.3d
12 1041, 1045 (9th Cir. 2017) (“where [...] an ALJ makes a legal error, but the record is uncertain and
13 ambiguous, the proper approach is to remand the case to the agency”) (citing *Treichler*, 775 F.3d
14 at 1105). It is only “rare circumstances that result in a direct award of benefits” and “only when
15 the record clearly contradicted an ALJ’s conclusory findings and no substantial evidence within
16 the record supported the reasons provided by the ALJ for denial of benefits.” *Leon*, 880 F.3d at
17 1047.

18 Such rare circumstances exist here. As to the first prong, the record is fully developed. It
19 spans nearly a thousand pages and contains treatment notes from dozens of doctor visits during the
20 insured period as well as medical history dating back as far as 2005. Although the ALJ insisted
21 Plaintiff did not undergo significant treatment during the relevant period, the record reflects
22 Plaintiff’s ongoing mental health problems and attempts to obtain treatment. The record also
23 reflects Plaintiff’s testimony before the ALJ and her responses to questionnaires about her
24 physical and mental limitations, and includes the lay statement of her mother—all of which
25 corroborate the disabling nature of Plaintiff’s impairments. In addition, the VE testified that
26 someone who would be off-task or unable to maintain attention and concentration for 10-15
27 percent of an eight-hour day, as determined by treating physician Dr. Trotta, would be
28 unemployable. *Compare* AR 591 (Dr. Trotta’s finding that Plaintiff had “extreme” impairment in

1 her ability to “maintain concentration, attention and persistence and complete a normal workday
2 and workweek without interruptions from psychologically based symptoms”) *with* AR 962-63 (VE
3 testimony).

4 The second and third prongs of the credit-as-true standard are also satisfied. The ALJ
5 failed to provide legally sufficient reasons for rejecting the informed medical opinion of Plaintiff’s
6 treating physician Dr. Trotta as well as the statement of her treating psychologist Dr. Liles, and
7 instead, improperly gave great weight to the older opinions of the state Agency nontreating,
8 nonexamining medical consultants. When credited as true, Dr. Trotta’s opinion establishes that
9 Plaintiff is disabled, because the VE testified that somebody with her limitations regarding
10 attention and concentration would be unemployable. (AR 962-63.) In addition, Dr. Trotta’s
11 opinion, if credited as true, directly contradicts the ALJ’s findings regarding whether Plaintiff’s
12 impairments satisfy the Paragraph B criteria for listings 12.04, 12.06 and 12.15. (AR 19-20.) *See*
13 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00 (Mental Disorders); *Kennedy v. Colvin*, 738 F.3d
14 1172, 1176 (9th Cir. 2013)(“When a claimant meets or equals a listing, he is presumed unable to
15 work and is awarded benefits without a determination whether he actually can perform his own
16 prior work or other work.”). Thus, the improperly rejected evidence establishes that Plaintiff is
17 entitled to benefits. *See Garrison*, 759 F.3d at 1022; *Lingenfelter*, 504 F.3d at 1041 n.12 (9th Cir.
18 2007); *Brown-Hunter v. Colvin*, 806 F.3d 487, 495 (9th Cir. 2015) (“The touchstone for an award
19 of benefits is the existence of a disability, not the agency’s legal error.”); *Trevizo v. Berryhill*, 871
20 F.3d 664 (9th Cir. 2017) (applying credit-as-true where: (1) ALJ failed to provide legally
21 sufficient reasons to discredit treating doctor’s opinion; (2) treating opinion was supported by
22 evidence; (3) VE testified that an individual of similar status and impairment was unable to work
23 full-time; and (4) plaintiff’s testimony was not inconsistent with the record).

24 The Commissioner insists that remand for an award of benefits is improper because the
25 record contains “conflicting evidence” regarding Plaintiff’s alleged disability—pointing to
26 “conflicts in the medical opinion evidence and issues surrounding Plaintiff’s subjective
27 allegations.” (Dkt. No. 21: at 12:8-10.) However, as discussed *supra*, neither of these arguments
28 is supported by the record. “[T]he credit-as-true rule foreclose[s] the argument that a remand for

1 the purpose of allowing the ALJ to have a mulligan qualifies as a remand for a useful purpose
2 under the first part of credit-as-true analysis.” *See Garrison*, 759 F.3d at 1021 (citing *Benecke*, 379
3 F.3d at 595) (“Allowing the Commissioner to decide the issue again would create an unfair ‘heads
4 we win; tails, let’s play again’ system of disability benefits adjudication.”) In sum, there is no
5 serious doubt based on the Court’s evaluation of the record as a whole that Plaintiff is disabled
6 within the meaning of the Social Security Act.

7 **CONCLUSION**

8 For the reasons stated above, Plaintiff’s motion for summary judgment is GRANTED and
9 Defendant’s cross-motion is DENIED. The Court VACATES the ALJ’s final decision and
10 REMANDS for an award of benefits.

11 This Order disposes of Docket Nos. 18 and 22.

12 **IT IS SO ORDERED.**

13 Dated: May 24, 2019

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JACQUELINE SCOTT CORLEY
United States Magistrate Judge